FOR ARGUMENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 75-104**

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., *et al.*,
*Petitioners,*

v.

HUGH L. CAREY, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITIONERS' REPLY BRIEF

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### ARGUMENT

Amidst a blizzard of citations to legislative materials which bear remotely, if at all, on the precise constitutional issues now before the Court, the three briefs filed on behalf of the respondents make sweeping assertions and dire predictions that may fit some other claim in some other case, but ignore the unique disquieting features of this record which are, we believe, dispositive. If one read only the respondents' briefs and had no other source of information regarding this case,

one might suppose that it is an action instituted by an avaricious white majority seeking to overturn the considered and deliberate judgment of a State legislature which had decided to remedy a history of intentional and sustained exclusion of blacks from the political process by evaluating racial housing patterns in a fair and realistic way and altering district lines so as to give all voters, regardless of race, an equal franchise. If those were the facts of this case, these petitioners —and, we believe, the *amici* who have joined us—would be among the first to argue that the policies of the Fourteenth and Fifteenth Amendments and the Voting Rights Act would require, and not conflict with, the legislative judgment.

The questions presented on our undisputed facts are, however, entirely different. We have here not an apportionment developed, as the Solicitor General would describe it, with only "a consciousness of the plan's racial impact" (US Brief 39), or with race merely taken "into account," as the intervenors would have it (NAACP Brief 32), but with a crude unvarnished racial quota as the dominant, and possibly exclusive, criterion. Nor does this case involve any finding or conclusion, by any official body—be it legislative, administrative, executive or judicial—that there has been either exclusion of blacks from the political process or minimization of black voting strength by reason of any past State policy or practice such as to require or warrant remedial action. And the undisputed history of this challenged 1974 reapportionment, enacted in a frenzied effort to dodge the coercive blows of the federal government, renders it totally distinguishable from the calm legislative action, based on a careful and deliberate policy determination, sustained by this Court in *Gaffney* v. *Cummings,* 412 U.S. 735 (1973).



**1. There was no free legislative choice.**

Both the Solicitor General and the State respondents seek to analogize New York's 1974 apportionment to the 1971 apportionment of the Connecticut legislature which this Court sustained in *Gaffney* v. *Cummings,* 412 U.S. 735, 751-754 (1973). The constitutional issue in *Gaffney* was whether a standard of "political fairness" deliberately chosen for Connecticut's districting —under which each district was drawn "with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties"—was an invidiously discriminatory gerrymander under the Fourteenth Amendment. This Court decided that it would not attempt "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States," and it refused to interfere with the State's choice "fairly to allocate political power to the parties in accordance with their voting strength." 412 U.S. at 754.

We have some initial question whether the "political fairness" doctrine of *Gaffney* authorizes a parallel deliberate "racial fairness" policy. At two points in the short discussion of this issue in *Gaffney,* this Court distinguished Connecticut's approach from *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), which concerned racial, rather than political, criteria. And—for reasons spelled out more fully in our principal brief—we believe that consciously casting legislative districts along racial lines is contrary to the nation's egalitarian tradition. While the electoral process in this country may be designed to encourage voters to cast their ballots in accordance with party ideologies, it should not be

structured to encourage voting for blacks or whites, or for religious or ethnic representatives. It may, therefore, be desirable for Connecticut (or any other State) to carve up its districts so that there are a certain number of assured Republican and Democratic seats to reflect the distribution of political strength throughout the State. But is it equally desirable for a State to embark deliberately on a policy of carving out safe Catholic or Jewish districts, or Polish or Italian districts, or black, Puerto Rican or white districts?

Whether such a deliberate racial, religious or ethnic policy, calmly and coolly selected by majority vote of a local legislature, may constitutionally be implemented consistently with the Fourteenth and Fifteenth Amendments may be a debatable constitutional question that the Court should resolve when and if a local legislature makes such a reasoned choice. If such a case were presented, this Court might decide, as it did in *Gaffney*, that even with the harmful encouragement such deliberate decisions give to racial bloc voting, the choice is so much a matter of a State's "essentially political process" that no federal interference is justified.

In this case, the New York legislature did not make a reasoned policy judgment to carve out a specific number of legislative districts with a minimum 65 percent nonwhite population. That result was coerced by the action of a federal official, acting under a questionable interpretation of a federal statute. Thus, no special deference to the State's action is due here because the State itself acted only because it was forced to do so by the federal government. (See pp. 8, 16, *infra.*) Whatever may be the merits of the federal official's judgment



in this matter,[1] this Court should not treat the 1974 New York reapportionment, as it treated the 1971 Connecticut law, as the product of a legitimate legislative process.

**2. Race was the dominant, if not exclusive, criterion.**

Asserting that the petitioners' argument "ignores the unavoidable realities of legislative redistricting" (US Brief 39), the Solicitor General describes this case as one in which those involved in drawing the lines were only "aware of at least the approximate racial

[1] We do not concede, notwithstanding the Solicitor General's assertion (US Brief 19-20), that the district court lacked jurisdiction to grant relief against the Attorney General. The complaint alleged that the unconstitutional district lines had been drawn "as a result of the erroneous and unconstitutional demands and standards imposed by agents of the defendant Attorney General of the United States" and specified the form of coercion exercised by the Department of Justice (App. 10). A proper—maybe even necessary—party defendant to secure the relief to which the petitioners are entitled is the federal officer who is forcing local officials to deny the petitioners' rights. See the authorities cited in our principal brief at pp. 53-54, n. 22. What we assumed, *arguendo*, at page 51 of our principal brief was that the Attorney General's disapproval of a plan submitted under Section 5 of the Voting Rights Act may not be subjected to judicial review, in and of itself, by a citizen of the jurisdiction who disagrees with it. But if the Attorney General persists in his erroneous view and, pursuant to unconstitutional and impermissible standards, compels local officials to take additional steps which affect the equal voting rights of individual citizens, those citizens may, under Sections 1331 and 1343 of the Judicial Code, secure relief against the Attorney General and all those who act in concert with him and obtain a declaratory judgment that his action is unconstitutional. To hypothesize an extreme situation: What if, following his April 1, 1974 letter, the Assistant Attorney General had insisted that New York enact a statute which gave two votes to every nonwhite voter in the affected districts and only one to each white voter? Could not the Attorney General be joined in an action brought by white voters to declare that statute unconstitutional?

and ethnic impact of possible redistricting plans" (*id.* at 40). Similarly, the intervenors argue that New York could not "close its eyes" or "ignore" or refuse to "take into account" the racial distribution of its voters (NAACP Brief 34-36). And the State respondents assert that a "racially mindless" approach is erroneous because "racial considerations" must be kept in mind "to avoid any unintentional discriminatory effects that prior districting plans may have had. . . ." (State Brief 23).

These arguments, in their varying forms, would be relevant if what the record showed was that New York had drawn up a districting plan based on the host of policies that enter into such a determination, and, as a part of that process, it had checked the effect of such a plan on racial minorities residing in the State. If it had then decided that adjustments in the lines were warranted because, among other considerations, "unintentional discriminatory effects" would result if such adjustments were not made, race consciousness would be involved in the process, but possibly not in an invidious or impermissible manner.

When we speak in our original brief of "race consciousness" or "racial gerrymandering" or "racial districting," we do not refer to this kind of race consciousness. A racial gerrymander is not proved by showing that the legislature knew that particular districts were predominantly white or black any more than racial discrimination in employment is proved by establishing that an employer conducted personal interviews of applicants or viewed photographs from which he could tell whether they were white or black. An employer may surely look at his labor force and decide, if he sees too



few minority employees, that there may be something wrong with his recruitment process. But there is a world of difference between that kind of race-consciousness and the establishment of a racial quota that supersedes *all* other criteria.

On the undisputed facts of this record—which all three respondents' briefs ignore—this case involves a blatant instance of an overriding racial quota. The one individual primarily responsible for drawing the challenged district line was asked whether the 65 percent "minimum standard" was the reason why he made the alteration in district lines that produced the harm to the petitioners. He replied, in words that carry their own emphasis (App. 112):

> That was the sole reason.

If an employer testified that the "sole reason" why he hired a certain white employee rather than a black one (or a black in preference to a white) was—to the exclusion of all usual employment factors such as individual skills and education—that he wished to meet a 65 percent racial quota he had set, could there be any question as to the impermissible nature of the discrimination? That is precisely what this record shows—not the well-meaning race consciousness that the respondents describe.

**3. No past discrimination is being corrected.**

It is curious that the Solicitor General's brief recites, in substantial detail, the allegations regarding the 1972 reapportionment made by the NAACP to the Attorney General (US Brief 8-11)—allegations which were vigorously controverted by both the State Attorney General and by legislators responsible for enacting the law,

and which were in no way credited by the United States in the letter of April 1, 1974, signed by Assistant Attorney General Pottinger.

For its part, the NAACP, as intervenor, continues to assert that its submission to the Attorney General regarding the 1972 law established that non-white voting strength had been "minimized," that non-whites had been "siphoned off," that non-white voters were placed into more "compact" districts, and that there was "racially polarized voting" (NAACP Brief 22-25). But the State respondents have, with equal vigor, denied the NAACP's conclusions, and do not agree, as of this date, with even the more limited conclusion based on burden of proof reached by the Assistant Attorney General (State Brief 17-21, nn. 11, 13).[2]

On this state of the record, it is totally beside the point to cite cases which permit racial criteria to be used "to ameliorate the effects of past discrimination" (US Brief 43-44), or to implement "remedial measures" (State Brief 19-20). Nothing had been done in or by New York State that required an affirmative ra-

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[2] Among the questionable assertions in the NAACP's submission —which is, we believe, riddled with *non sequiturs*—is this flat observation, following a summary of Assembly, Senate and Congressional districts (App. 222):

> Not a single white community of any size is located in a majority non-white district in Kings County.

Of course, these petitioners, the Hasidic community of Williamsburgh—a white community of 30,000 people—was located, under the plan the NAACP was challenging, in the 57th Assembly District, which had a population that was 61.5% non-white and was described as "majority non-white" in the remainder of the NAACP's submission.



cial remedy or that justified what would otherwise be obvious racial discrimination.

The State respondents argue that, as a simple matter of practicality, they found it necessary to use racial criteria "to overcome the objections that the Department of Justice had raised with respect to the prior district lines" (State Brief 21) because the 1972 law had been declared invalid under the applicable regulation sustained in *Georgia* v. *United States,* 411 U.S. 526 (1973). But that shift of responsibility is precisely why petitioners brought this action against *both* the State officers and the Attorney General of the United States. The former may not justify resort to an unconstitutional measure by insisting that it was necessitated by the demands of the latter.

Conversely, the Attorney General—at whom the State respondents point their finger—may not treat this case as simply one in which a State is engaged in "good faith efforts . . . to comply with the Voting Rights Act" (US Brief 49), ignoring his own role in setting the standard for that action. The nature of the instructions given to the State were described in undisputed testimony (App. 96, 105-106). That testimony proved that the Department of Justice was not expressing any objective of "ameliorating the effects of past discrimination" but was directing the New York legislature to fix a specified non-white percentage, in the neighborhood of 65 to 70 percent, "to effect the possibility of a minority candidate being elected within that district."[3]

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[3] Decisions such as *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973), and *City of Richmond* v. *United States,* 422 U.S. 358 (1975), cited by the inter-

**4. Proper implementation of the Voting Rights Act is not affected.**

Both the intervenor and the Solicitor General suggest that our position, if sustained, would jeopardize the administration of the Voting Rights Act and frustrate the objectives Congress wished to achieve in reenacting that important legislation (US Brief 47-50, NAACP Brief 11-20). We are told that we "plainly disagree" with Congress' reasons for extending the life of the Act (NAACP Brief 18)—an allegation which we as plainly deny.

We have set out in our principal brief (pp. 4-7), the tragic history of the Hasidic community of Williamsburgh before it arrived in the United States and the slow awakening of that community to the rewards that are offered in a democracy by active participation in politics. Just as the community has become aware of these possibilities, its efforts have been aborted because district boundaries have been manipulated to achieve a particular minimum racial percentage in those districts where Hasidim reside, and where, even prior to

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venors and the Solicitor General, do *not* illustrate the proposition that remedial measures are appropriate to overcome *past* discrimination allegedly committed under the statutes that have been invalidated pursuant to Section 5 of the Voting Rights Act. Both were annexation cases, and the effects of an annexation are, of course, *present* effects. What the courts in these cases prescribed were new voting procedures that would neutralize the *current* effects of an annexation that might otherwise, if uncorrected, violate Section 5 and the Fifteenth Amendment. Interestingly enough, none of the respondents' briefs has met the challenge we put forth at pages 37-38 of our brief (echoing Judge Frankel's observation at Pet. App. 46a): How does past racial discrimination in districting have a continuing effect that would require "amelioration" by some means beyond current eradication of the unlawful discrimination?



the manipulation, they were part of a racial minority.[4] Such manipulation of legislative districts is what the NAACP and the Solicitor General insist was a principal focus of Congressional attention in 1970 and 1975, and we emphatically agree that it should be prohibited. Consequently, we are in full sympathy with the purposes of the Act as it has been extended and renewed.

The flaw in the reasoning of the NAACP and the Solicitor General is that they refuse to recognize that, in certain circumstances, "manipulation" along racial lines may harm white communities, just as it more often harms blacks, Chicanos or Puerto Ricans. The Department of Justice's obliviousness to this need to protect whites as well as blacks is demonstrated tellingly by the extraordinary conclusions reached in the Memorandum that accompanied the Department's approval of the 1974 law (App. 291, 293):

> The Voting Rights Act was enacted to "enforce the Fifteenth Amendment . . . and for other purposes." The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race, color or previous condition of servitude. Both the intent and purpose of the Fifteenth Amendment and the Voting Rights Act appears to have been primarily to eliminate discrimination against Negroes, a group which had been long subjected to discrimination in the voting process because of race.
>
> While the legislative history and judicial interpretations of the Fifteenth Amendment do not identify what groups, if any, other than blacks may be protected by the Amendment, we conclude that

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[4] The testimony indicated that under the 1972 lines, the 57th Assembly District, where the Hasidic community was located, was 61.5% non-white.

Puerto Ricans in New York may be considered within the protections of the Fifteenth Amendment and the Voting Rights Act by virtue of both judicial precedent and Congressional determinations.

* * *

In contrast to the foregoing conclusion regarding Puerto Ricans, there was nothing revealed by our review of the circumstances surrounding the adoption of the Fifteenth Amendment, the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political subdivisions under the Act which indicated that Hasidic Jews or persons of Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act. Nor has material supporting that view been brought to our attention by others. We are forced to conclude, therefore, that given what we now know of relevant precedent, these groups are not among those whose rights the Attorney General is commanded and empowered to protect in his consideration of a submission under Section 5 of the Voting Rights Act.

This one-sided view of constitutional and statutory protections was, of course, rejected recently by the Court in *McDonald* v. *Santa Fe Trail Transp. Co.,* 96 S. Ct. 2574 (1976). The intent of the 1869 Congress which adopted the Fifteenth Amendment was surely no less evenhanded than the intent of the 1866 Congress which enacted what is now 42 U.S.C. § 1981. And we believe that the 1970 and 1975 Congresses would have viewed the racial quota imposed here against whites as no less abhorrent than racial quotas imposed against blacks.



Nor, we believe, did the Congresses that sought to outlaw manipulative devices aimed at diluting the votes of racial minorities intend to authorize Department of Justice employees to make the kinds of judgments and to issue the kinds of instructions that are shown by this record. Mr. Scolaro, the executive director of New York's reapportionment committee, testified that what was "suggested" to him by the Department of Justice was (App. 96):

> . . . that the lines be amended so that in certain areas such as in Brooklyn you should consolidate the Black areas, that is put some additional Blacks into adjacent White areas in order to affect the possibility of greater Black representation in districts that are adjacent to those districts presently being represented by Blacks.
>
> Now, that argument with respect to Brooklyn was just the opposite of that in Manhattan. There they took the position that we had overdiluted the Black population and as a result we should attempt to take the Black populace out of the White areas and create more substantial majorities in the Black districts within Manhattan, and that particularly in the senate districts of Manhattan.

Who is it, one wonders, who is doing the "manipulating" of district lines when, under the guise of good faith administration of the Voting Rights Act, such directives come from Washington?

Moreover, it seems clear that the broad remedial policy which the NAACP views as incorporated in the 1970 and 1975 extensions of Section 5 of the Voting Rights Act are not those that this Court has accepted. In *Beer* v. *United States,* 96 S. Ct. 1357 (1976), this Court reversed a district court judgment based on a

sweeping interpretation of Section 5 and read it as barring only a new law that would, in comparison with preceding law, constitute "a retrogression in the position of racial minorities." 96 S. Ct. at 1364. New York's 1972 reapportionment was patently not judged by this standard. Not a word in Assistant Attorney General Pottinger's letter contrasts the voting power of non-white residents of Kings County under the 1972 law with their voting power under the 1966 apportionment. To be sure, the opportunity to assert this claim appears now to have been lost, in view of New York's failure to take Mr. Pottinger's decision to court. But it is hardly likely that, as the NAACP asserts, the 1972 Kings County apportionment was illustrative of what Congress wanted to prohibit if, under the standard utilized in *Beer,* it would have been upheld.

Before leaving this aspect of the case, we must note that the intervenors are correct if they assert that we "plainly disagree" with observations made by the Civil Rights Commission regarding desirable voting patterns. We cannot deny that racial choices are made by individual voters as they cast their ballots—although it is not invariably true that "white voters refuse to vote for black candidates solely because of their race" (NAACP Brief 16). To the extent that this phenomenon exists, we believe that the traditions of this country demand that government act in a manner that will overcome and, if possible, eliminate this racial bias, rather than in a manner that is calculated to appease it. A shortage of black elected officials, if one exists, should not be met by gerrymandering all blacks into one or several districts and then encouraging everyone to vote on the basis of race. It should be met by striking down



artificial barriers and encouraging election of individuals on the basis of individual capabilities.

What astounds us most of all about the three respondents' briefs is that none of them even cites, much less discusses, *Anderson* v. *Martin,* 375 U.S. 399 (1964). If the manipulation of a district line to achieve a 65 percent quota is permissible to accomplish the election of blacks, why should racial designations—which facilitate black voters' recognition of black candidates—be prohibited?

**5. What justifies a 65 percent quota?**

In our principal brief we put forth three independent arguments. The respondents have addressed their arguments principally to the first of these—our contention that racial districting is *ipso facto* unconstitutional. Our second contention—that there was no past discrimination requiring current correction—is dealt with by the intervenors with the reiteration of their rejected assertions of fact and by the State with a claim that it had no choice, given Mr. Pottinger's decision, but to accept his racial criteria.

We find almost no mention or response in the briefs to our third, and most narrow, argument. What conceivable justification is there for the particular quota remedy used by the Justice Department and the State officials? How is past discrimination cured by fixing 65 percent as the magic number and rejecting both 63.4 percent and the existing 61.5 percent?

The NAACP brief is the only one to provide any response, and its answer can be charitably described as lame. The 65 percent standard, it says, "was only a guideline for projecting when white and non-white eli-

gible voting age populations were equal. . . ." (NAACP Brief 48). If it was a "guideline," it was surely the most precisely followed "guideline" in history. Mr. Scolaro, the reapportionment official, testified that he tried a variety of alternatives which ranged between 61.5 and 63.4 percent, and that nothing he tried "got to 65 percent" (App. 115). On the basis of his discussions with the Department of Justice, he concluded that "anything under 65 would not be acceptable" (App. 106). How much more rigid must a percentage figure become to go from a "guideline" to a "quota"?

## CONCLUSION

Although the color of the petitioners' skin places them, for better or worse, in the category of a "majority" race, they are, as we have described in our principal brief, subject to discrimination, in various aspects of life, which is more damaging than that imposed on many minorities. This case illustrates how the inequities caused by deliberate racial distinctions may bring pain even to members of a class that appears superficially to be in privileged status. It proves that racial quotas—particularly in the area of elections—must be recognized as abhorrent and totally impermissible, no matter at whom directed.

For the Hasidim of Williamsburgh, this is a case that tests the assurances given them by those leaders who have been urging that they have confidence in America and join the democratic process that is the lifeblood of this country. The litigation has, unfortunately, pitted this Jewish community (as well as those Jewish organizations which have joined us as *amici*), against the representative of a racial minority that has been the victim of great injustice. By our



argument here, we do not seek to diminish, in any manner, the efforts to correct that injustice. But the Hasidim of Williamsburgh believe that even those zealous for racial equality might heed the advice of King Solomon, by tradition the wisest of men and the author of the Biblical Book of *Proverbs* (XVI:8):

> Better is a little with righteousness
> Than great revenues with injustice.

The Hasidim of Williamsburgh know that the events of April and May 1974 wreaked an injustice upon them. They were substantially disabled for one reason, and one reason only— the color of their skin. That disability, they believe, cannot withstand the scrutiny of a fair tribunal, particularly a Court sensitive, as this one has been, to instances of racial discrimination. The Hasidim have brought their case here with trust in the Solomonic maxim that "Righteousness exalteth a nation" (*Proverbs,* XIV:34).

For the foregoing reasons, the judgment of the court of appeals should be reversed with instructions to enter summary judgment for petitioners.

Respectfully submitted,

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